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No. 85-1010

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD HUME PASCHALL AND
WILLIAM ALBERT RICKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioners' convictions for extortion in violation of the Hobbs Act, 18 U.S.C. 1952.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a)[1] is reported at 772 F.2d 68.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1985, and a petition for rehearing was denied on September 26, 1985 (Pet. App. 29a). The petition for a writ of certiorari was filed on November 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]Petitioners' appendix is unpaginated. We have paginated it, denominating the successive pages "1a," "2a," etc.

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioners were convicted on two counts of extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1952.[2] Petitioner Paschall was sentenced to one year's imprisonment on the first count and a suspended sentence of 30 months' imprisonment on the second count. Petitioner Ricker received a suspended sentence of three years' imprisonment. Both petitioners also were sentenced to three years' probation and a fine of $5,000.

1. The evidence at trial showed that petitioners were officials of the North Carolina Department of Transportation and that they accepted vacations paid for by construction companies that performed work for the Department. Petitioner Paschall was the resident engineer charged with supervising the construction of sections of a highway in the late 1970's. Petitioner Ricker was the chief inspector for parts of this project. Pet. App. 4a-5a.

In 1980, petitioners accepted a trip to Hilton Head Island, South Carolina from the Asheville Contracting Company, a contractor on the highway project. They were flown to and from the resort on a company plane and stayed at a villa owned by the company. Pet. App. 5a. Petitioners also accepted a hunting trip to Texas offered by Phillips & Jordan, Inc., another state highway contractor. Phillips & Jordan provided petitioners with round-trip air transportation, housing in a hunting lodge, and food, drink, guns, and ammunition. *Id.* at 7a. There was also evidence that petitioners accepted other trips and benefits from these contractors over an extended period of time. *Id.* at 8a. Petitioners

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[2]A third count charging petitioner Paschall with extortion was dismissed after the jury was unable to reach a verdict.

accepted these favors in violation of the Department's policy against the receipt of gifts from contractors. *Id.* at 17a.

As supervisors of the highway construction project, petitioners exercised considerable discretionary authority over the work of the contractors. Petitioners possessed, for example, the power to interpret and enforce contract specifications, to determine whether completed work would have to be redone, and to control the amount and timing of progress payments. The evidence showed that Phillips & Jordan in particular was apprehensive that it not suffer the expenses that would be entailed by rigid and overly technical adherence to contract requirements on the part of state officials such as petitioners. Pet. App. 8a-10a, 15a-17a. The evidence also showed that Paschall permitted numerous violations of the Department's policies and procedures, which allowed the contractors to obtain larger payments than those specified in the contracts and to violate the contractual work plans and specifications. *Id.* at 19a; see also, *e.g.*, C.A. App. 21, 23, 27, 29, 39-40, 61; Tr. 314, 337.[3]

2. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-28a. The court of appeals held that petitioners' acceptance of vacation trips "for an implicit promise of fair treatment" (*id.* at 27a) violated the Hobbs Act, 18 U.S.C. 1952, because petitioners were aware that the contractors had offered them significant benefits by virtue of their official positions (Pet. App. 11a-12a). The court also determined that the jury was correctly instructed in accordance with the prevailing view of the law. *Id.* at 10a-12a, 19a-22a. Finally, although the court of appeals noted that the Second Circuit had reversed a Hobbs Act conviction in *United States* v. *O'Grady*, 742 F.2d 682 (1984) (en banc), it declined to require precisely the same jury instructions as

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[3]Citations to the trial transcript and to the appendix in the court of appeals are taken from the government's brief in that court.

the court had approved there, and in any event it distinguished *O'Grady* on the ground that the jury had been instructed here that only the acceptance of significant benefits could violate the Act. Pet. App. 23a-26a.

ARGUMENT

Petitioners contend (Pet. 14-23) that they were simply passive recipients of gratuities and that their conduct therefore did not rise to the level of extortion in violation of the Hobbs Act. For the most part, their petition merely reargues the evidence and mischaracterizes the jury instructions. The district court did not, contrary to petitioners' assertion (Pet. 12), instruct the jury that they should find petitioners guilty merely "if [they] found that Petitioners were public officials and had taken the two trips in question." Rather, the jury was instructed that they must find that petitioners willfully and intentionally accepted significant benefits from contractors with knowledge that the contractors had offered them the benefits "with the expectation" that petitioners would, in turn, bestow favors on them. Pet. App. 12a; Tr. 825-828. The jury, by its verdict of guilty, necessarily rejected petitioners' arguments (Pet. 7-12) that they were unaware of who was sponsoring the trips or why they were being offered and that petitioners performed various maintenance tasks in exchange for the Hilton Head trip.

Contrary to petitioners' argument (Pet. 15-16), the decision of the court of appeals fully accords with the decisions of other courts of appeals. As the court stated in *United States* v. *Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), cert. denied, 450 U.S. 965 (1981), "[t]he government is merely required to prove that a public official obtained money to which he was not entitled and which he obtained only because of his official position." See also, *e.g.*, *United States* v. *Butler*, 618 F.2d 411, 418 (6th Cir.) ("a showing that the motivation for the payment focuses on the recipient's office

* * * is sufficient to convict under the Hobbs Act"), cert. denied, 447 U.S. 927 (1980); *United States* v. *Jannotti*, 673 F.2d 578, 595 (3d Cir.) (en banc) (following *Hedman*), cert. denied, 457 U.S. 1106 (1982) and No. 83-1891 (Oct. 9, 1984). The jury was instructed precisely in accordance with this case law, and the government's evidence plainly showed that petitioners accepted substantial benefits from private contractors who depended on them for the favorable exercise of their official discretionary powers, with full knowledge that this was the motivation behind the contractors' favors. Nothing more is required.

Nor does the decision below conflict in substance with *United States* v. *O'Grady*, *supra*. Although the court of appeals in *O'Grady* required slightly different jury instructions from those used here, the substance of the offense as defined by the Second Circuit is not materially different from that accepted by the court of appeals in this case, and the evidence here would satisfy the requirements established in *O'Grady*. Moreover, since *O'Grady* this Court has consistently denied certiorari in Hobbs Act cases arising in circuits that, like the Fourth, have approved somewhat different verbal formulations of the proper jury instructions where an official is charged with extortion under color of official right. *Kenner* v. *United States*, No. 85-358 (Nov. 12, 1985); *McClelland* v. *United States*, No. 84-6407 (June 10, 1985); *Swift* v. *United States*, No. 84-449 (Jan. 14, 1985); *Jannotti* v. *United States*, No. 83-1891 (Oct. 9, 1984). There is no reason for a different result here.

In *O'Grady*, the court of appeals held that a defendant must "misuse[] his office to obtain benefits not due him" in order to violate the Hobbs Act. 742 F.2d at 693. The court of appeals emphasized in *O'Grady* that "the government is not required to prove that the public official demanded or directly solicited the benefits received, or that he offered a

specific *quid pro quo* in exchange for the benefits." *Id.* at 688-689. Instead, the government need show only that "the power of public office was misused in such a way as to induce the giving of benefits." *Id.* at 689. The court recognized that "inducement can take many forms, some more subtle than others. Proof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a *quid pro quo* would suffice * * *." *Id.* at 691. And in a concurring opinion joined by a majority of the judges, the court of appeals also held that inducement may be inferred from "repeated acceptances over a period of time of substantial benefits." *Id.* at 694 (Pierce, J., concurring).

Petitioners' conduct plainly satisfied the key requirement established in *O'Grady* of a misuse of public office.[4] Petitioners "accepted the benefits knowing the motives of their benefactors" (Pet. App. 26a), in exchange for "an implicit promise of fair treatment" (*id.* at 27a). This sort of tacit understanding among public officials and private parties subject to their power, especially in the context of petitioners' repeated acceptance of benefits over a long period of time (*id.* at 8a), is ample to demonstrate the sort of inducement or misuse of office required in *O'Grady*.[5] Moreover,

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[4]As petitioner correctly notes (Pet. 20-21), the Fourth Circuit has required the misuse of office in order to support a conviction under the "color of official right" branch of the Hobbs Act. See *United States* v. *Grande*, 620 F.2d 1026, 1031, cert. denied, 449 U.S. 830 (1980); see also *United States* v. *Barber*, 668 F.2d 778, 783-784, cert. denied, 459 U.S. 829 (1982). The court of appeals carefully reconciled its decision in this case with *Barber*. See Pet. App. 19a-23a. Even if there were an intracircuit conflict, however, it would be for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[5]Cf. *United States* v. *Barber*, 668 F.2d at 783-784 ("The giving of free liquor in substantial quantities is altogether contrary to custom, unless there is a reason, *i.e.*, an expectation of a *quid pro quo*. When the

the jury instructions approved by the court of appeals in this case did not suffer from the error found by the court in *O'Grady* of allowing a guilty verdict to rest merely on the passive receipt of benefits, and the instructions here also carefully required the jury to find that the benefits were substantial. See Pet. App. 11a-12a, 25a.[6] Finally, the evidence in this case showed that the contractors did in fact obtain unduly favorable treatment from petitioners (see page 3, *supra*), in contrast to *O'Grady*, where the defendant was known as " 'a tough man when it came to enforcing the rights of [the city transit authority].' " 742 F.2d at 685.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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'donee' is the state's alcoholic beverage chief, the conclusion is irresistible that, absent a convincing explanation, the 'gift' was not a gift, but, rather, was in return for favors or for the withholding of punitive measures.").

[6]The Seventh Circuit recently explained in *United States* v. *Schmidt*, 760 F.2d 828, 832 (1985), cert. denied *sub nom. Folak* v. *United States*, No. 84-1991 (Oct. 7, 1985), that the standard it enunciated in *United States* v. *Hedman, supra*, which was followed by the court of appeals here (see Pet. App. 19a-21a), is consistent with *O'Grady's* requirement of a misuse of public office, whatever the actual form of words used in the instructions.